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No. 82-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALI GALEB AHMED, *et al.*,
Petitioners, Plaintiffs,

VS.

AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSOCIATION, INC., *et al.*,
Respondents, Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Plaintiffs are twenty-six seamen who obtained default judgments against their employers. Those judgments were not satisfied due to the employers' insolvency, and plaintiffs brought an action in state court against the employers' insurer, American Steamship Owners Mutual Protection and Indemnity Association (the "American Club"). The action was removed to the Northern District of California on diversity grounds and was tried to the court on an agreed statement of facts. (CR 33)[1]

[1] In accordance with the Ninth Circuit practice, the citations to the Clerk's Record ("CR") are to the docket number of the cited document.

In the district court plaintiffs contended that "STATE LAW GOVERNS QUESTIONS INVOLVING MARINE INSURANCE" (CR 35, p. 3), and they argued that state law entitled them to bring a direct action against their employers' insurer. The district court explicitly relied on the parties' agreement that state law governed and ruled that the applicable law was that of New York. (App. A, pp. A-4, A-5; 444 F. Supp. at 571-72)

The district court found that the insurance policies were ones of indemnification, not liability, and that New York law provided that an insurer under such a policy is not directly liable to an injured person even though the insured is insolvent and cannot pay the judgment. (App. A, pp. A-3, A-4, A-5; 444 F. Supp. at 571-72) The district court also held that although New York had enacted a general direct action statute, that "statutory modification of the common law rule is of no benefit to plaintiffs, for the statute is made expressly inapplicable to marine insurance contracts . . . . " (App. A, pp. A-5, A-6; 444 F.Supp. at 572) The district court therefore entered judgment for the American Club. (App. A; 444 F.Supp. 569)

Plaintiffs appealed, but they "[did] not appeal the district court's ruling that New York law governs this diversity action". (App. C, p. C-3 n.1; 640 F.2d at 995 n.1) The Ninth Circuit affirmed the district court's interpretation of the insurance contracts and its application of New York law but remanded to allow plaintiffs to raise an issue not presented below—that Section 167(4)'s exemption of "marine protection and indemnity insurance" from the statutory direct action requirement denied equal protection of the laws. (App. C, pp. C-5, C-6; 640 F.2d at 995-96)

On remand, the district court rejected plaintiffs' contention that seamen were a "suspect" class, ruled that it "should not sit as a superlegislature", and upheld the statute. (App. D, pp. D-7, D-8) The Ninth Circuit affirmed in a per curiam opinion. (App. F; 701 F.2d 824)

REASONS FOR DENYING THE WRIT

Plaintiffs' Petition fails to show any "special and important reasons" to grant the writ. (Rule 17.1) Thus nowhere does the

Petition demonstrate that the decision below conflicts with a decision of another circuit court or of a state court of last resort, or that it conflicts with applicable decisions of this Court, or that it decided an important question of federal law which has not been, but should be, settled by this Court. That, by itself, is a sufficient basis for denying the writ. We nevertheless turn to plaintiffs' purported grounds for granting the writ and show them to be without merit.

I.

THE PURPORTED EQUAL PROTECTION ISSUE IS NOT WORTHY OF REVIEW BY THIS COURT.

The Petition is unclear as to just what issues it asks this Court to address respecting the fourteenth amendment's equal protection clause.[2] Apparently plaintiffs are dissatisfied because the lower courts did not subject New York Insurance Law Section 167(4) to heightened judicial scrutiny (Pet., pp. 19-21) and because the lower courts found that the statute was rationally related to a legitimate state purpose. (Pet., pp. 17-18, 20-21) None of plaintiffs' arguments raise issues appropriate for review by this Court.

A. No Important Issue Exists As To The Standard Which Was Applied.

Traditionally, equal protection analysis has been based on two different standards of review. Statutes which make classifications based on inherently suspect criteria, such as race, or which infringe fundamental rights, are subject to strict scrutiny. See, *e.g., Loving* v. *Virginia,* 388 U.S. 1 (1967); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). In such cases, the court asks whether the statute serves a compelling state interest. *E.g., Shapiro* v. *Thompson, supra,* 394 U.S. 618, 634.

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[2] The first question presented purports to raise an issue under Article 1, § 11 of the New York Constitution, but plaintiffs offer no reason why this Court should consider that state law question. The lower courts rejected plaintiffs' state constitutional argument, and so has the United States District Court for the Southern District of New York. *Miller* v. *American Steamship Owners Mutual Protection and Indemnity Co.,* 509 F.Supp. 1047 (S.D.N.Y. 1981).

Where no suspect classification or fundamental right is involved, the test of constitutionality is whether the statute has a rational relation to a legitimate state interest. *E.g., Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471, 489 (1977).

In *Plyler* v. *Doe,* 457 U.S. 202 (1982), this Court held that a third, or "intermediate", standard is to be applied to classifications which "while not facially invidious, nonetheless give rise to recurring constitutional difficulties . . . . " 457 U.S. at 217 (1982). Under that standard, a court asks whether the classification "may fairly be viewed as furthering a substantial interest of the State". 457 U.S. at 217-18 (1982). It is that standard which plaintiffs suggest should have been applied. (Pet., pp. 19-21)

There is no reason for this Court to grant the writ in order to rule upon plaintiffs' arguments concerning the intermediate standard. (See Pet., pp. 19-21) First, the Court need not grant the writ to consider whether the intermediate standard exists or the criteria for its application. Both of those issues were addressed last term in *Plyler.*

Second, plaintiffs make no claim that a decision by this Court as to the asserted applicability of intermediate standard will have any significance beyond this particular challenge to Section 167(4). The Petition therefore raises no important issue of law for the Court's consideration.

Third, the intermediate standard concerns classifications which give rise to "recurring constitutional difficulties", and thus it is applicable only where legislation discriminates against groups which

> "[w]hether or not the groups in question might qualify for treatment as 'discrete and insular minorities,' they bear enough resemblance to such minorities to warrant more than casual judicial response when they are injured by law." L. Tribe, *American Constitutional Law,* § 16-31, p. 1090 (1978).[3]

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[3] Accordingly, the intermediate standard has been applied to classifications such as gender, alienage and illegitimacy. *Plyler* v. *Doe,* 457 U.S. 202 (1982) (alienage); *Levy* v. *Louisiana,* 391 U.S. 68 (1968) (legitimacy); *Reed* v. *Reed,* 404 U.S. 71 (1971) (gender).

"Seamen" plainly do not constitute such a group. Indeed, to suggest that an occupation, which is freely entered and may freely be left, places someone in such a group fails to understand what heightened judicial review is all about and does nothing but demean the real suffering experienced by truly disadvantaged classes.

Fourth, the statute does not separately classify seamen; it treats maritime insurance differently from other types of insurance. Maritime situations are not the same as non-maritime, and therefore plaintiffs have failed even to raise an equal protection issue. As this Court put it: "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler* v. *Doe,* 457 U.S. 202, 216 (1982). Moreover, plaintiffs concede that the statute treats identically all those involved in maritime torts (Pet., p. 18), and therefore to show that the statute discriminates against seamen, plaintiffs were required to prove that the statute was passed "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon [seamen]". *Personnel Administrator* v. *Feeney,* 442 U.S. 256, 279 (1979); *accord, Harris* v. *McRae,* 448 U.S. 297, 323-24 n.26 (1980). No such evidence was offered or exists. The issue of what standard of review would be applicable to a statute which did discriminate against seamen is not present in this case; the question is academic at best.

B. No Important Issue Exists As To The State Purpose.

The district court reviewed the legislative purpose and held that Section 167(4) was rationally related to a legitimate state purpose. (App. D, pp. D-7, D-8) The Ninth Circuit affirmed. (App. F, p. F-2; 701 F.2d at 825) The District Court for the Southern District of New York reached the same result in another case. *Miller* v. *American Steamship Owners Mutual Protection and Indemnity Co.,* 509 F.Supp. 1047 (S.D.N.Y. 1981). There is no reason for this Court to review that factual determination.

II.

THE PURPORTED CHOICE OF LAW ISSUE IS NOT WORTHY OF REVIEW BY THIS COURT.

Plaintiffs ask this Court to review the lower court's application of New York law, saying that maritime insurance contracts should be governed by admiralty law. The issue is frivolous.

First, neither court below decided the issue. (See Rule 17.1) They did not do so because plaintiffs affirmatively argued that "STATE LAW GOVERNS" (CR 35, p. 3; App. A, p. A-4; 444 F.Supp. at 571), and did not appeal the district court's determination that the state law which governed was that of New York. (App. C, p. C-3 n.1; 640 F.2d at 995 n.1) There is no reason for this Court to address an issue which petitioners affirmatively agreed below does not exist. *See, e.g., Miree* v. *DeKalb County, Georgia,* 433 U.S. 25, 34 (1977) (Court will not consider issue which was "neither pleaded, argued, nor briefed" below); *Tennessee* v. *Dunlap,* 426 U.S. 312, 314 n.2 (1976); *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 397-98 (1971).

Second, plaintiffs virtually concede that *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.,* 348 U.S. 310 (1955), has already decided their nonissue and has resolved it against them. (Pet., p. 24) In *Wilburn* this Court ruled that the creation of any admiralty rule respecting marine insurance was for Congress, not the courts. 348 U.S. at 319-20. This case certainly is not an appropriate vehicle for this Court to reexamine *Wilburn* and Congress' twenty-eight year acceptance of it.

CONCLUSION

The Petition should be denied.

Dated: July 14, 1983

Respectfully submitted,

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